

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

JAMES DUNCAN

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1548 WDA 2013

Appeal from the Judgment of Sentence September 10, 2013
In the Court of Common Pleas of Erie County
Criminal Division at No(s): CP-25-CR-0000909-2012

BEFORE: GANTMAN, P.J., BENDER, P.J.E., and LAZARUS, J.

MEMORANDUM BY LAZARUS, J.:

FILED DECEMBER 23, 2014

James Duncan appeals from his judgment of sentence, imposed in the Court of Common Pleas of Erie County, after a jury convicted him of third-degree murder and related charges. Upon careful review, we affirm based, in part, on the opinion of the Honorable Daniel J. Brabender, Jr.

On June 21, 2011, the naked and mutilated body of 27-year-old Nikkia Sawyer was discovered by her mother at Sawyer's apartment at the Highpoint Towers in the City of Erie. Sawyer's body was lying partially covered with blankets and towels on her bed, with numerous stab wounds. Her feet were bound with a garment, her hands were tied behind her, and there was a shirt or cloth covering her face. When Sawyer's face was uncovered, a pair of Victoria's Secret panties was found stuffed in her mouth. From the large number of stab wounds to Sawyer's body and the

absence of a significant volume of blood in the apartment, the police determined that the scene had been cleaned up before the body was discovered.

An autopsy revealed that Sawyer had been stabbed approximately 60 times, including in the face, neck, chin, chest and torso. Dried semen was found on Sawyer's breasts and navel area, as well as on a fleece blanket on Sawyer's bed, and was sent for DNA analysis.

Duncan, at the time also a resident of Highpoint Towers, was acquainted with Sawyer through his girlfriend, Shekirah Curry, who had known Sawyer since they were both eight years old. Duncan's DNA was found in the samples taken from Sawyer's body and the blanket. His hand print was also found on a Victoria's Secret bag hanging on Sawyer's bedroom door.

Duncan was arrested on February 22, 2012, and charged with criminal homicide/murder,¹ aggravated assault,² possession of instruments of crime (PIC),³ recklessly endangering another person (REAP),⁴ and abuse of

¹ 18 Pa.C.S.A. §§ 2501 and 2502.

² 18 Pa.C.S.A. § 2702(a)(1).

³ 18 Pa.C.S.A. § 907(a)(2).

⁴ 18 Pa.C.S.A. § 2705.

corpse.⁵ Following multiple continuances granted at the request of the defense, Duncan was finally brought to trial on July 8, 2013. After six days of testimony, the jury returned a verdict of guilty on all counts on July 16, 2013. On September 10, 2013, the trial court sentenced Duncan to a term of 20 to 40 years' incarceration on the third-degree murder conviction, 6 to 12 months' incarceration for PIC, and 6 to 12 months' incarceration for abuse of corpse.⁶ All sentences were imposed consecutively. Duncan filed post-sentence motions, which were denied by order entered on September 20, 2013. Duncan filed a timely notice of appeal followed by a court-ordered statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b).

On appeal, Duncan raises the following issues for our review:

1. There was insufficient evidence to support the verdicts of third degree murder, aggravated assault, [PIC], [REAP], and abuse of a corpse, as there was insufficient evidence to prove beyond a reasonable doubt that [Duncan] assaulted and subsequently caused the death of [Sawyer].
2. The trial court abused its discretion by refusing to grant defense counsel's multiple requests for a continuance.
3. The trial court abused its discretion in permitting the jury to observe Duncan in handcuffs and shackles in a video played for the jury during which Duncan was being interviewed by law enforcement.

⁵ 18 Pa.C.S.A. § 5510.

⁶ The aggravated assault and REAP convictions merged for purposes of sentencing.

4. The trial court abused its discretion when it permitted the jury to hear testimony that Duncan allegedly made statements that his tattoos represented that he had killed someone and that he had stated to his girlfriend that he would kill her.

5. The trial court violated [Duncan's] right to due process and ef[f]ective assistance of counsel during the voir dire process by admonishing counsel for asking questions and attempting to rehabilitate jurors who were answering questions in a way adverse to the defense.

6. The trial court erred in permitting the prosecution to present gruesome and explicit photographs of [Sawyer's body].

7. The trial court abused its discretion in sentencing Duncan when it failed to take into account Duncan's rehabilitative needs and prior record and when considering allegations that supported a charge for which Duncan was not convicted.

Brief of Appellant, at 2-3. For the reasons that follow, we affirm Duncan's judgment of sentence on the basis of Judge Brabender's opinion.

Duncan first claims that the evidence was insufficient to support his convictions.

As a general matter, our standard of review of sufficiency claims requires that we evaluate the record in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. Nevertheless, the Commonwealth need not establish guilt to a mathematical certainty. Any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances.

Commonwealth v. Lynch, 72 A.3d 706, 707-08 (Pa. Super. 2013)

(internal citations and quotation marks omitted).

Here, the trial court concluded that sufficient evidence was presented to support all of Duncan's convictions. **See** Trial Court Opinion, 3/31/14, at 5-12. Specifically, the court noted, *inter alia*, the following evidence: Duncan's DNA was found on dried secretions located on the victim's breast and navel area, as well as a fleece blanket on her bed; Duncan's fingerprints were found on a Victoria's Secret bag found hanging on the victim's bedroom door; Duncan threatened to kill his girlfriend "like that retarded b***";⁷ Duncan lived in the same building as the victim; Duncan's girlfriend was friends with the victim, having known her since childhood. We agree with the trial court that the evidence, viewed in the light most favorable to the Commonwealth, was sufficient to sustain the verdicts. **Lynch, supra.**

Duncan next alleges that the trial court abused its discretion in refusing to grant defense counsel's multiple requests for continuances. The grant or refusal of a request for continuance is a matter vested in the sound discretion of the trial court, and its decision will not be reversed in the absence of an abuse of that authority. **Commonwealth v. Birdsong**, 650 A.2d 26, 34 (Pa. 1994).

In its opinion, the trial court sets forth a very thorough breakdown of all continuance and funding requests made by Duncan prior to trial. **See**

⁷ Although she was not mentally retarded, the victim's father testified that she suffered from an unspecified mental illness.

Trial Court Opinion, 3/31/14, at 12-16. In light of that history, the trial court concluded as follows:

The defense attorneys assigned to the case remained the same throughout, and had ample opportunities, time and funding to procure necessary experts and reports. The [c]ourt granted multiple defense requests for continuances and promptly disposed of requests for funding. Ultimately, all requests for funding by the [c]ourt were granted[.]

Further, [Duncan] cannot demonstrate he was prejudiced by denial of requests for continuances in May and June of 2013, as one of the reasons for the requests was to procure one or more experts for a possible death penalty phase of the trial. [Duncan] was convicted of third degree murder. The death penalty was thus not part of the sentencing scheme.

Trial Court Opinion, 3/31/14, at 15.

Upon review, we agree with the trial court that it did not abuse its discretion in refusing to grant additional continuances to Duncan.

Duncan next claims that the trial court erred by permitting the jury to observe him in handcuffs and shackles in a video of a police interview. “The Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial.” **Deck v. Missouri**, 544 U.S. 622, 642 (2005).

As the trial court notes, Duncan was neither shackled nor handcuffed during his trial. Rather, the jury was shown a video of a post-arrest interview of Duncan conducted at the police station in which he was cuffed and shackled. The video lasted twenty minutes and “[t]he brief portion of

the interview when [Duncan's] leg chains were barely discernable occurred when [Duncan] raised his feet to the table during the last eight minutes of the video," which were not played for the jury. Accordingly, any glimpse of Duncan's restraints would have been *de minimis* and inconsequential. **See *Commonwealth v. Carson***, 913 A.2d 220 (Pa. 2006) ("[A] brief viewing of the defendant in handcuffs is not so inherently prejudicial as to strip the defendant of the presumption of innocence."). This claim is meritless.

Next, Duncan asserts that the trial court abused its discretion in permitting the jury to hear testimony by Duncan's girlfriend, Shekirah Curry, that Duncan had made statements that his teardrop tattoos meant that he had killed someone and that he had stated to Curry that it was time to get another such tattoo.

The threshold inquiry with admission of evidence is whether the evidence is relevant. Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable, or supports a reasonable inference or presumption regarding the existence of a material fact. In addition, evidence is only admissible where the probative value of the evidence outweighs its prejudicial impact.

Commonwealth v. Antidormi, 84 A.3d 736, 750 (Pa. Super. 2014) (internal quotations and punctuation omitted).

Duncan argues that the admission of Curry's statement regarding the meaning of Duncan's tattoos and the fact that it was time to get another tattoo "could only be considered by the jury as substantive evidence [that Duncan had committed the instant murder], as they were not prior

convictions.” Brief of Appellant, at 27. Accordingly, they were unduly prejudicial and inadmissible.

The Commonwealth argues that Duncan’s statement that it was time to get another tattoo was admissible as an admission pursuant to Pa.R.E. 803(25) and that the meaning of the tattoo – that he had previously killed someone – cannot be severed from the admission because it explains it.

First, we note that Curry’s hearsay testimony that it was time to get another teardrop tattoo was clearly relevant to the instant matter, as it tended to show that Duncan had committed a murder. Second, as an admission that he had killed someone, the statement qualifies as an admission by a party-opponent under Rule 803(25). Finally, we concur with the trial court that the statements were not unduly prejudicial under Pa.R.E. 403. Rule 403 provides as follows:

The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Pa.R.E. 403.

In support of his claim that the statement was improperly admitted, Duncan cites the decision of this Court⁸ in ***Commonwealth v. Corley***, 638

⁸ Duncan also cites ***Commonwealth v. Jensch***, 469 A.2d 632 (Pa. Super. 1983), and states that there, this Court “granted the defendant a new trial when a witness testified in a drug possession case that he had spoken to him about drug transactions and ‘how he went through college.’” Brief of (Footnote Continued Next Page)

A.2d 985 (Pa. Super. 1994). There, the defendant appealed his rape conviction, claiming that the trial court improperly admitted testimony from the victim stating that the defendant had told her that he “had done this twice before.” *Id.* at 987. Defendant objected to this testimony on the basis that it improperly referred to uncharged past criminal conduct and that the court failed to give a limiting instruction. This Court concluded that the statement was properly admitted to show threat or force used in the commission of the crime at issue.⁹ However, Duncan completely mischaracterizes the holding of this case, asserting that this Court agreed that the testimony was inadmissible because it was admitted as substantive evidence to prove the commission of the crime for which he was currently on trial.

Regardless of Duncan’s mischaracterization, **Corley** is inapposite to the case at hand. Here, the testimony regarding the tattoos was admitted as an admission of guilt in the *current* matter, not as evidence of prior uncharged criminal conduct. The testimony that Duncan’s teardrop tattoos symbolized the fact that he had previously killed one or more people was

(Footnote Continued) _____

Appellant, at 27. Unfortunately, the fact pattern and holding described by Duncan is not present in **Jensch**.

⁹ This Court also concluded that the trial court erred by giving an improper jury instruction regarding the testimony. However, since defense counsel failed to object to the instruction, the defendant’s judgment of sentence was affirmed.

necessary to explain and contextualize Duncan's subsequent statement that it was time to get another, similar tattoo. In addition, at trial, Curry, whom the trial court authorized the Commonwealth to treat as a hostile witness, backtracked on her prior statements to police about the meaning of the tattoos. On direct examination, Curry testified as follows:

A: The killing part about the tattoos, he said that one time. That was when he first got them, but ever since then it's always been [that it means you've lost a loved one]. He always say [sic] stuff like that to make himself look macho or something. I don't know.

Q: You told the police he told you they were for killing people, right?

A: Yes.

Q: And you're saying that's a lie today, right, that you lied to the police?

A: I just told you what he said. I told you he said that in the beginning when he got them. I didn't say that was a lie. I said the part where he said another one is a lie.

Q: He did say that to you?

A: About getting another one?

Q: Yes.

A: No, he didn't.

Q: But you told the police that?

A: I told the police that, yes.

N.T. Trial, 7/12/13, at 143-44.

In addition, defense counsel was given every opportunity to cross-examine Curry regarding the tattoos and Duncan's statements with regard thereto and, in fact, did so. **See id.** at 160-61. Curry again backtracked on her prior statements to police. In light of these facts, we agree with the trial court that, "while harmful to [Duncan's] case, these statements were such that their probative value outweighed any prejudice to [Duncan]." Trial Court Opinion, 3/31/14, at 18. As this Court has previously noted,

Evidence is not unfairly prejudicial simply because it is harmful to the defendant's case. The trial court is not required to sanitize the trial to eliminate all unpleasant facts from the jury's consideration where those facts are relevant to the issues at hand. Exclusion of evidence on the grounds that it is prejudicial is limited to evidence so prejudicial that it would inflame the jury to make a decision based upon something other than the legal propositions relevant to the case.

Commonwealth v. Flamer, 53 A.3d 82, 88 n.7 (Pa. Super. 2012) (internal citations and quotation marks omitted). Accordingly, the trial court did not err in admitting Curry's testimony regarding Duncan's statements as to his teardrop tattoos.

Duncan next claims that the trial court violated his rights to due process and effective assistance of counsel during the *voir dire* process by admonishing his counsel for asking questions and attempting to rehabilitate jurors who were answering questions in a manner adverse to the defense. The trial court, in its Rule 1925(a) opinion, asserts that this claim is waived because, as presented in Duncan's Rule 1925(b) statement, it was too vague to permit meaningful review. Specifically, the court concludes that Duncan

“failed to identify instances where the [c]ourt’s alleged interference during *voir dire* occurred, or when bias was demonstrated.” Trial Court Opinion, 3/31/14, at 19.

The relevant portion of Duncan’s Rule 1925(b) statement reads as follows:

20. The trial court denied [Duncan] the right to due process and effective assistance of counsel during the *voir dire* process. First, the trial court continually admonished defense counsel for attempting to ascertain whether the jurors could follow specific court instructions and trial counsel was forced to voice continuing objections to the repeated admonishment on the record. Further, on several occasions, the trial court (and not the prosecutor) attempted to rehabilitate jurors who were answering questions by responding with answers that would precipitate a defense request that the jurors be struck for cause. In this regard, the trial court showed bias in favor of the prosecution and denied [Duncan] the protections that individual *voir dire* was designed to provide to a criminal defendant.

Rule 1925(b) Statement, 10/11/13, at ¶ 20.

Here, *voir dire* lasted three days and filled 702 transcript pages. While we agree with the trial court that Duncan could have provided specific citations to the record to better facilitate the trial court’s review, we find that Duncan’s Rule 1925(b) statement was sufficiently specific to allow the trial court to address the claim, which it did. Accordingly, we do not find this issue waived and will address its merits.

The scope of *voir dire* rests in the sound discretion of the trial court, whose decision will not be reversed on appeal absent palpable error. ***Commonwealth v. Manley***, 985 A.2d 256, 264 (Pa. Super. 2009) (citation

omitted). The purpose of voir dire is solely to ensure the empanelling of a competent, fair, impartial, and unprejudiced jury capable of following the instructions of the trial court. ***Id.***

In his brief, Duncan complains of three specific statements by the trial court. First, after questioning numerous prospective jurors, the court instructed counsel to limit their questioning regarding specific potential jury instructions concerning aggravating and mitigating circumstances. Later, after questioning additional venirepersons, the court reiterated that instruction to defense counsel as follows:

I may have to hold you back on some of the things that are for instructions, okay? You can't expect these people to know what you're talking about right out of the gate when you're talking about aggravating and mitigating circumstance and all that does is offer more confusion. The question is, once again, can you follow the Judge's instructions and be fair.

N.T. Jury Selection, 7/8/13, at 105-06.

Based on the brief statements cited by Duncan, we can ascertain no bias or other abuse of discretion on the part of the trial court. As the court properly noted, the purpose of *voir dire* is to determine whether a prospective juror will be able to follow instructions and be impartial. ***Manley, supra.*** Delving into specific potential jury instructions is unnecessary and, as the court noted, potentially confusing for those not familiar with legal terminology. Our review of the *voir dire* proceedings in this case reveals that both parties were given ample opportunity to thoroughly question potential jurors regarding, *inter alia*, the death penalty,

potential biases and their willingness to follow instruction from the court. Moreover, defense counsel expressed her own satisfaction with the panel upon conclusion of *voir dire*. **See** N.T. Jury Selection, 7/10/13, at 36-37. For these reasons, the trial court did not violate Duncan's rights to due process and effective assistance of counsel during *voir dire*.

Next, Duncan argues that the trial court erred in allowing the Commonwealth to present "gruesome and explicit" photographs of the victim to the jury.

The admissibility of photographs falls within the discretion of the trial court and only an abuse of that discretion will constitute reversible error. The test for determining whether photographs are admissible involves a two-step analysis. First, the court must decide whether a photograph is inflammatory by its very nature. If the photograph is deemed inflammatory, the court must determine whether the essential evidentiary value of the photograph outweighs the likelihood that the photograph will improperly inflame the minds and passions of the jury.

Commonwealth v. Malloy, 856 A.2d 767, (Pa. 2004) (internal citations and quotation marks omitted).

We rely on the analysis of the trial court in concluding that this claim lacks merit. Specifically, the trial court notes that, while potentially inflammatory, the three photographs briefly published to the jury were not overly gruesome and "assisted in demonstrating the positioning and appearance of the body . . . , the crime scene as testified to by investigating officers, the violent nature of the assault, and the wounds described by the pathologist." Trial Court Opinion, 3/31/14, at 21. Accordingly, their

probative value outweighed the likelihood that they would improperly inflame the minds and passions of the jury. **Malloy, supra.**

Finally, Duncan claims that the trial court abused its discretion in sentencing him by failing to consider his rehabilitative needs and prior record and by “considering allegations that supported a charge for which Duncan was not convicted.” Brief of Appellant, at 3. This is a challenge to the discretionary aspects of Duncan’s sentence.

A challenge to the discretionary aspects of a sentence is not appealable as of right. Rather, an appellant must petition for allowance of appeal pursuant to 42 Pa.C.S.A. § 9781. **Commonwealth v. Hanson**, 856 A.2d 1254, 1257 (Pa. Super. 2004).

Before we reach the merits of this [issue], we must engage in a four part analysis to determine: (1) whether the appeal is timely; (2) whether Appellant preserved his issue; (3) whether Appellant’s brief includes a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of sentence; and (4) whether the concise statement raises a substantial question that the sentence is appropriate under the sentencing code. The third and fourth of these requirements arise because Appellant’s attack on his sentence is not an appeal as of right. Rather, he must petition this Court, in his concise statement of reasons, to grant consideration of his appeal on the grounds that there is a substantial question. Finally, if the appeal satisfies each of these four requirements, we will then proceed to decide the substantive merits of the case.

Commonwealth v. Austin, 66 A.3d 798, 808 (Pa. Super. 2013) (citations omitted).

Here, Duncan has filed a timely appeal and preserved this issue by filing a post-sentence motion for reconsideration of sentence. He has also included in his brief a statement pursuant to Pa.R.A.P. 2119(f), in which he claims that his sentence was manifestly excessive because it was not individualized. Duncan asserts that a lesser period of incarceration would have achieved the goals of protecting the public and rehabilitating him. This Court has previously failed to find a substantial question where an appellant claimed that his sentence was manifestly excessive in that the court failed to give individualized consideration to his personal history, rehabilitative needs or background, and without explaining how, as a matter of law, this sentence was the least stringent one adequate to protect the community and to serve the appellant's rehabilitative needs. **See Commonwealth v. Edwards**, 71 A.3d 323 (Pa. Super. 2013). Accordingly, we find that Duncan has failed to present a substantial question for our consideration.

Assuming, *arguendo*, that he had presented a substantial question, Duncan's claim would be meritless. Here, the trial court was in possession of a pre-sentence report. Where a pre-sentence reports exists, we presume that the sentencing judge was aware of the relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors. **Commonwealth v. Walls**, 926 A.2d 957, 967 n.7 (Pa. 2007). Judge Brabender made a lengthy statement prior to

imposing sentence, in which he stated that he took the following information into consideration in fashioning Duncan's standard-range sentence:¹⁰ (1) the pre-sentence report; (2) Duncan's prior record, beginning when he was a juvenile; (3) the pre-sentencing memoranda submitted by counsel; (4) Duncan's in-court statement; (5) letters submitted by Duncan's family and supporters; (6) letters submitted by the victim's family and friends; (7) the fact that Duncan was on court supervision at the time he committed the murder; (8) Duncan's diagnosis of depression; (9) the fact that Duncan received his GED; (10) the fact that Duncan has two small children; and (11) the "inhumane and barbaric" nature of Duncan's crime. **See** N.T. Sentencing, 9/10/13, at 20-33.

Based upon the record, we cannot conclude that the sentence imposed by the trial court was manifestly excessive. Moreover, the trial court considered all relevant information prior to sentencing Duncan. Accordingly, this final claim is without merit.¹¹

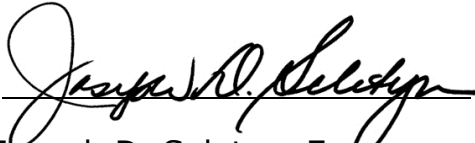
¹⁰ We note that, under the sentencing guidelines, there is no aggravated-range sentence for the crime of third-degree murder; it is subsumed in the standard range.

¹¹ To the extent that Duncan claims that the trial court "believed that [Duncan] was guilty of more than third[-]degree murder" and sentenced him accordingly, this claim is based upon a statement by the court taken out of context. Just prior to imposing sentence, and after recounting the horrific nature of Duncan's crime, the court noted that "because of the fine work of your attorneys you were convicted only of third[-]degree murder." N.T. Sentencing, 9/10/13, at 33. We do not interpret this to mean that the court
(Footnote Continued Next Page)

Counsel is directed to attach a copy of the trial court opinion in the event of further proceedings in this matter.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/23/2014

(Footnote Continued) _____

believed Duncan was, in fact, guilty of first-degree murder; rather Judge Brabender was merely complimenting Duncan's counsel on their work on behalf of their client at trial.

COMMONWEALTH OF PENNSYLVANIA : IN THE COURT OF COMMON PLEAS
 : OF ERIE COUNTY, PENNSYLVANIA
 :
 v. : CRIMINAL DIVISION
 :
 JAMES DUNCAN, DEFENDANT : NO. 909 of 2012

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OPINION

Appellant, James Duncan, filed a Notice of Appeal on September 25, 2013, from the judgment of sentence imposed after a jury trial. This Opinion is in response to the 1925(b) Statement of Matters Complained of on Appeal.

BACKGROUND OF THE CASE

On Tuesday, June 21, 2011, the naked and mutilated body of the victim, Nikkia Sawyer (“Sawyer”), was found by her mother, Juanita Sawyer, at the victim’s apartment located at Highpoint Towers in Erie, Pennsylvania. Sawyer was 27 years old and lived alone. *Trial Transcript, Day One, July 10, 2013 (“T.T. 1”), pp. 44-45, 73.* The Appellant was also a resident of Highpoint Towers at the time, and was acquainted with Sawyer.

Sawyer had spent Father’s Day weekend with her parents from Saturday, June 18, 2011 to Sunday, June 19, 2011. On Sunday evening, Sawyer’s parents dropped her off at her apartment between 8:00 p.m. and 9:00 p.m. This was the last time Sawyer’s parents saw her alive. *T.T. 1, pp. 47-50.*

Late afternoon or early evening on Tuesday, June 21, 2011, Sawyer’s mother found Sawyer’s body in bed with stab wounds in Sawyer’s apartment. *Trial Transcript, Day Three, July 12, 2013 (“T.T. 3”), p. 178.* The mother telephoned the police and the father. *T.T. 1, p. 45; T.T. 3, p. 178.* Police arrived at approximately 5:20 p.m. and found the mother sitting in a chair,

visibly upset and crying, rocking in her chair. *T.T. 1, pp. 31-32.* The father arrived shortly thereafter. *T.T. 1, p. 44.*

The police found Sawyer dead, lying on her back in bed, nude and partially covered. Her feet were off the bed, and although it appeared her feet were wrapped in bedding, they were actually bound with a garment. There were multiple stab wounds to her body. *T.T. 1, pp. 32-33.* Sawyer's hands were tied behind her, somewhat off to the side. *T.T. 1, pp. 34, 36-37.* There was a shirt or cloth covering her face. *T.T. 1, p. 34.* She was partially covered in blankets and towels. *T.T. 1, p. 93.* There was a cloth around Sawyer's head. *T.T. 1, p. 99.*

The coroner arrived, detectives photographed Sawyer's body as items were removed from it, and Sawyer's body was removed.

From the large number of stab wounds to Sawyer's body and the absence of a significant volume of blood in the apartment, it was apparent the scene had been cleaned up before the body was discovered. *T.T. 3, pp. 178-179, Trial Transcript, Day 4, July 15, 2013 ("T.T. 4"), p. 32.*

The crime scene was processed before and after Sawyer's body was removed. Physical evidence collected by the police included a steak knife wrapped in a brown washcloth or rag found in the bathroom sink. The steak knife had a serrated, bent blade. *T.T. 1, pp. 94, 102, 107.* Another knife, a butcher knife with an 8-inch tapered blade, was found wrapped in a blanket or towel, on top of Sawyer's body. *T.T. 1, pp. 118, Trial Transcript, Day Two, July 11, 2013 ("T.T. 2"), p. 9.* A Victoria's Secret bag was found hanging on Sawyer's bedroom door, on the bedroom side. *T.T. 2, pp. 17, 43.* A hand-print left by four fingers sequentially was found on the Victoria's Secret bag. *T.T. 2, pp. 17-18; 43.* Samples of semen stains from a fleece blanket from Sawyer's bed were sent for DNA analysis. *T.T. 3, p. 40.*

Eric Vey, M.D., forensic pathologist, performed an autopsy of Sawyer on June 23, 2011. Vey described the manner in which a garment used to gag Sawyer was tied around the back of her head. *T.T. 2, p. 61, 64-65.* When the garment was removed from Sawyer's head during the autopsy, a bundled pair of Victoria's Secret panties was found stuffed in Sawyer's mouth. *T.T. 2, p. 61; T.T. 3, p. 32.* A long-sleeved garment was tied around Sawyer's ankles with a knot. *T.T. 2, p. 61.* A swabbing from the knot of the garment tied around Sawyer's ankles was among the items sent for DNA analysis. *T.T. 3, pp. 29, 31.* Sawyer's wrists were tied with copper wire with black insulation. *T.T. 2, p. 63.*

Vey prepared a sexual assault kit which included oral and nasal swabs, and swabs of dried secretions found on Sawyer's breasts and her navel area for DNA analysis. *T.T. 2, pp. 67-68, 70; T.T. 3, pp. 29-30.*

Vey identified approximately 60 knife wounds over Sawyer's body. The wounds included serrated scrape marks; superficial stab wounds and cuts to the face, neck, and chin; superficial stab wounds to the chest; and deep stab injuries to the chest and torso. *T.T. 2, pp. 72-117.* The wounds were consistent with use of the serrated steak knife and the larger butcher knife. *T.T. 2, pp. 121-122.* Some of the wounds were inflicted perimortem; others were inflicted postmortem. *T.T. 2, pp. 84, 89-90, 96, 112.* Vey also identified an abrasion to the left lower forehead, above the left eyebrow. *T.T. 2, pp. 150-151.* Vey determined Sawyer died from multiple stab injuries to the chest. *T.T. 2, pp. 117, 122.*

Appellant's DNA was found on Sawyer's breasts and navel area. *T.T. 2, pp. 181-185.* Appellant's DNA was found on a fleece blanket from Sawyer's bed. *T.T. 2, pp. 187-188, 193.* Appellant's hand-print was on the Victoria's Secret bag. *T.T. 2, pp. 92, 94, 97.* Appellant was a

potential contributor to the DNA found on the knot of the binding around Sawyer's ankles. *T.T. 2, pp. 185-186.*

Appellant was arrested and incarcerated at the Erie County Prison on February 22, 2012. *T.T. 4, pp. 25-26, 88-90.* Bail was denied.

After a six-day jury trial, Appellant was convicted of Third Degree Murder; Aggravated Assault; Possessing Instruments of Crime; Recklessly Endangering Another Person; and Abuse of Corpse.¹

Appellant was sentenced on September 10, 2013 to an aggregate of 21 to 42 years of incarceration, as follows:

- Count 1: Murder of the Third Degree – 20 to 40 years of incarceration with 567 days credit for time served;
- Count 2: Aggravated Assault – Merged with Count 1;
- Count 3: Possessing Instruments of Crime – 6 to 12 months of incarceration consecutive to Count 1;
- Count 4: Recklessly Endangering Another Person – Merged with Count 1;
- Count 5: Abuse of Corpse – 6 to 12 months of incarceration consecutive to Counts 1 and 3.

There were no fines levied, though Appellant was ordered to pay court costs.

On September 18, 2013, Appellant filed a Motion for Post-Sentence Relief, requesting a new trial and modification of sentence. The Motion was denied by Order entered on September 20, 2013.

Appellant filed a Notice of Appeal on September 25, 2013 and a 1925(b) Statement of Matters Complained of on Appeal on October 11, 2013.

¹18 Pa.C.S.A. § 2502(c); 18 Pa.C.S.A. §2702(a)(1); 18 Pa.C.S.A. §907(a)(2); 18 Pa.C.S.A. §2705 and 18 Pa.C.S.A. §5510, respectively.

DISCUSSION

Paraphrased, Appellant raises seven claims for appellate review.

- (1) There was insufficient evidence to convict Appellant of the charges.
- (2) It was an abuse of discretion to deny Appellant's requests for a continuance of the trial.
- (3) It was an abuse of discretion to permit the jury to view a video of Appellant wearing handcuffs and shackles during a police interview.
- (4) It was an abuse of discretion to admit evidence of Appellant's statements that his teardrop tattoos signified he had killed someone; that it was time to get another teardrop; and that he told his girlfriend during an argument, "I'll kill you like that retarded b---- Nikkia."
- (5) The trial court denied Appellant's right to due process and effective assistance of counsel during *voir dire*.
- (6) The trial court abused its discretion in permitting publication to the jury of photographs of the victim at the crime scene.
- (7) The sentence was manifestly excessive and unreasonable; the court fashioned the sentence by relying on impermissible factors; the court failed to consider Appellant's rehabilitative needs and impermissibly considered the allegations supporting the First Degree Murder charge for which Appellant was acquitted.

I. SUFFICIENCY OF EVIDENCE

When evaluating a challenge to the sufficiency of the evidence, the court must determine whether, viewing the evidence in the light most favorable to the Commonwealth as the verdict winner, together with all reasonable inferences from that evidence, the trier of fact could have found each element of the crime charged was established beyond a reasonable doubt. *Commonwealth v. Hargrave*, 745 A.3d 20, 22 (Pa.Super. 2000), *appeal denied*, 760 A.2d 851 (Pa. 2000)(internal citations omitted); *Com. v. Brunson*, 938 A.2d 1057, 1058 (Pa.Super. 2007); *Commonwealth v. Chambers*, 599 A.2d 630, 633 (Pa. 1991). The Commonwealth may sustain

its burden of proof by means of wholly circumstantial evidence. *Commonwealth v. Hopkins*, 747 A.2d 910, 913 (Pa.Super. 2000). The facts and circumstances established by the Commonwealth need not preclude every possibility of innocence, and any questions or doubts are to be resolved by the fact-finder, unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances. *Commonwealth v. Hopkins*, *supra* at 913-14.

Viewing the evidence against this standard, Appellant's contentions are without merit.

A. Murder of the Third Degree

Third Degree Murder "is intentional act, characterized by malice, that results in death, intended or not." *Commonwealth v. Fisher*, 80 A.3d 1186, 1191 (Pa. 2013). As the Pennsylvania Supreme Court explained:

Section 2502 of the Crimes Code defines the three degrees of murder. This section sets forth the *mens rea* for first degree murder, see 18 Pa.C.S.A. §2502(a) (an intentional killing), and defines second degree murder as that occurring during the perpetration of a felony. See *Id.*, §2502(b). Regarding third degree murder, however, the statute simply states, "All other kinds of murder shall be murder of the third degree." *Id.*, §2502(c). Importantly, § 2502(c) does not set forth the requisite *mens rea* for third degree murder; however, §302(c) of the Crimes Code provides, "When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts *intentionally, knowingly or recklessly* with respect thereto." *Id.*, §302(c). (emphasis added).

Case law has further defined the elements of third degree murder, holding: [T]o convict a defendant of the offense of third [] degree murder, the Commonwealth need only prove that the defendant killed another person with malice aforethought. This Court has long held that malice comprehends not only a particular ill-will, but ... [also a] wickedness of disposition, hardness of heart, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured. *Commonwealth v. Santos*, 583 Pa. 96, 876 A.2d 360, 363 (2005)(alteration in original)(internal citation, quotation, and emphasis omitted); see also *Commonwealth v. Drum*, 58 Pa. 9, 15 (1868)(defining malice as quoted above). This Court has further noted:

[T]hird degree murder is not a homicide that the Commonwealth must prove was committed with malice and without a specific intent to kill. Instead, it is a homicide that the Commonwealth must prove was committed with malice, but one with respect to which the Commonwealth need not prove, nor even address, the presence or absence of a specific intent to kill. Indeed, to convict a defendant for third degree murder, the jury need not consider whether the defendant had a specific intent to kill, nor make any finding with respect thereto. *Commonwealth v. Meadows*, 567 Pa. 344, 787 A.2d 312, 317 (Pa. 2001)(quoting *Commonwealth v. Young*, 748 A.2d 166, 174-75, 561 Pa. 34 (Pa. 1999)).

Commonwealth v. Fisher, supra.

The evidence presented by the Commonwealth established beyond a reasonable doubt the elements of Third Degree Murder.

The jury heard expert testimony from Alex Glessner, Ph.D., forensic DNA scientist for the Pennsylvania State Police. *T.T. 2, pp. 155-157.* Glessner testified concerning the processing of the forensic DNA samples submitted for analysis, and the results of the DNA analysis. *T.T. 2, pp. 157-196.* Glessner testified Appellant's DNA was found on the swabbings of dried secretions from Sawyer's breast and navel area. *T.T. 2, pp. 181-185.* Appellant's DNA was found on the fleece blanket from Sawyer's bed. *T.T. 2, pp. 187-188, 193.* Appellant was a potential contributor to the DNA found on the knot of the binding around Sawyer's ankles. *T.T. 2, pp. 185-186.*

The jury also heard testimony from Corporal Richard J. Pottorf, Jr., an expert in fingerprint examination. *T.T. 3, pp. 74-77.* Pottorf is a trooper with the Pennsylvania State Police, assigned to the Bureau of Forensic Services at the Erie Regional Crime Laboratory. *T.T. 3, p. 74.* Pottorf compared latent fingerprints developed at the crime scene with known fingerprints. *T.T. 3, pp.* Pottorf identified a hand-print left sequentially with four fingers on the Victoria's Secret bag hanging on Sawyer's bedroom door as belonging to Appellant. The print

from the medial segment of the right ring finger was positively identified as Appellant's print. *T.T. 3, pp. 92-99.*

The jury also heard testimony from Shekirah Curry. *T.T. 3, pp. 119-176.* Curry testified she and Appellant were in a relationship for approximately ten years, from 2001 to 2011. Curry is the mother of Appellant's child. *T.T. 3, pp. 119-121.* She last saw Appellant approximately two weeks before trial. *T.T. 3, p. 121.* She and Sawyer had been friends since childhood. *T.T. 3, p. 129-130.* Appellant was living in Highpoint Towers in 2011. *T.T. 3, p. 128.* Curry spoke with the police four times concerning Sawyer's death. *T.T. 3, p. 131.* The jury heard Curry testify how, on December 15, 2011, Curry went to the police station after learning that Appellant's DNA had been found on Sawyer's body. Curry reported to Detective Jason Triana that Appellant told Curry, "I'll kill you like that retarded b---- Nikkia." *T.T. 3, pp. 140-141.* Curry testified that Appellant, who had teardrop tattoos underneath his eye, told Curry the significance of having a teardrop tattoo below the eye was, "To lose a loved one and if you kill somebody." *T.T. 3, pp. 141-142.* Curry told the police Appellant told her he thought about getting another teardrop tattoo. *T.T. 3, pp. 141-142.*

Vey testified concerning the manner in which Sawyer was bound, gagged and brutally cut and stabbed. *T.T. 2, pp. 57, 61-117.* Vey identified approximately 60 knife wounds, from Sawyer's face and neck to her chest and torso. Use of the bent, serrated steak knife found in the bathroom sink was consistent with the superficial cuts and stab wounds and sweeping scrape marks on Sawyer's body. The butcher knife with the eight-inch tapered blade found wrapped in a towel on Sawyer's body was used to inflict the plunging stab wounds to Sawyer's chest and torso. *T.T. 2, pp. 72-122.* Sawyer died from multiple stab wounds to the chest. *T.T. 2, p. 117.*

The killing of Sawyer was a deliberate act, characterized by malice. Viewing the evidence in the light most favorable to the Commonwealth, together with all reasonable inferences from the evidence, the jury reasonably concluded Appellant committed the crime of Third Degree Murder.

B. Aggravated Assault

Aggravated Assault is defined in relevant part, as follows:

A person is guilty of aggravated assault if he: attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life.

18 Pa. C.S.A. §2702(a)(1).

It is readily apparent the Commonwealth proved the elements of Aggravated Assault. There is no doubt Appellant intentionally, knowingly or recklessly caused serious bodily injury to Sawyer when he bound and gagged her and brutally cut and stabbed her with a serrated steak knife and a butcher knife, eventually killing her.

C. Possessing Instruments of Crime

Possessing Instruments of Crime is committed when a person “possesses any instrument of crime with intent to employ it criminally.” *18 Pa.C.S.A. §907(a)*. The Commonwealth must prove beyond a reasonable doubt that the defendant (1) possessed an instrument of crime and (2) did so with intent to employ it criminally. An instrument of crime is defined as: “(1) Anything specially made or specially adapted for criminal use. (2) Anything used for criminal purposes and possessed by the actor under circumstances not manifestly appropriate for lawful uses it may

have.” *18 Pa.C.S.A. §907(d); Commonwealth v. Magliocco*, 896 A.2d 1280, 1284 (Pa.Super. 2002); *Commonwealth v. Robertson*, 874 A.2d 1200, 1209 (Pa.Super. 2005).

Appellant was in possession of knives. Appellant utilized the knives with the intent to employ them criminally, that is, to perpetrate an assault upon Sawyer, and put her in fear of serious bodily injury. In fact, the victim died of her injuries from knife wounds. The knives were possessed by Appellant under circumstances not manifestly appropriate for their lawful uses. The evidence establishes Appellant’s intent to use the knives criminally. The elements of the crime have been met.

D. Recklessly Endangering Another Person

Recklessly Endangering Another Person occurs when a person “recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.” *18 Pa.C.S.A. §2705*. “Serious bodily injury” is “[b]odily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.” *18 Pa.C.S.A. §2301*.

To sustain a conviction under Section 2705, the Commonwealth must prove the defendant had an actual present ability to inflict harm and not merely the apparent ability to do so. Danger, not merely the apprehension of danger, must be created. The *mens rea* for recklessly endangering another person is a conscious disregard of a known risk of death or great bodily harm to another person. *Commonwealth v. Hopkins*, 747 A.2d 910, 915-916 (Pa.Super. 2000)(internal citations and quotations omitted).

Sawyer’s legs were bound at the ankles and her hands were tied behind her. A pair of panties was stuffed in her mouth to gag her. She was alive when numerous cut and stab wounds

were inflicted. Vey identified 19 wounds to the victim's face, ranging from serrated scrapes, superficial cuts and superficial stab wounds. Sawyer was alive when the facial wounds were inflicted. *T.T. 2, p. 84*. At least one wound to the neck, a cut approximately three and three-fourths inches long from a serrated knife, was inflicted while Sawyer was alive. *T.T. 2, pp. 86-87, 89*. The majority of the 15 superficial chest wounds were inflicted while Sawyer was alive. *T.T. 2, p. 96*. The deep stab injuries to the chest and torso had features indicating they were inflicted while Sawyer was alive. *T.T. 2, p. 112*. She apprehended Appellant was inflicting serious bodily harm. Appellant's actions caused her death.

E. Abuse of Corpse

Abuse of a corpse occurs when: "... a person who treats a corpse in a way that he knows would outrage ordinary family sensibilities commits a misdemeanor of the second degree." *18 Pa.C.S.A. §5510*. Dr. Vey testified to numerous knife wounds inflicted to Sawyer's neck, chin, and chest inflicted post-mortem or while the victim was dying. *T.T. 2, pp. 89-90, 96*. Moreover, Appellant left Sawyer's mutilated body on the bed in her bedroom, naked, bound by her ankles and wrists and gagged with panties stuffed in her mouth. Sawyer's mother, then her father, found her corpse in this state. When the police arrived, they found Sawyer's mother crying, visibly upset, rocking in her chair. *T.T. 1, pp. 32-33*. Such conduct does indeed constitute an outrage to ordinary family sensibilities. *See Commonwealth v. Smith, 567 A.2d 1070 (Pa.Super. 1989)*.

From these facts the jury could reasonably infer wounds were inflicted post-mortem, and the corpse was left in a manner Appellant knew would outrage ordinary family sensibilities.

Accordingly, there is no merit to Appellant's contention the evidence was insufficient to establish the crime of Abuse of Corpse.

II. DENIAL OF APPELLANT'S REQUESTS FOR CONTINUANCES

Appellant claims the Court abused its discretion by refusing to grant requests by defense counsel for a continuance prior to trial. Appellant claims the Court refused to grant requests for a continuance after defense counsel advised the Court that defense experts were unprepared. Appellant claims defense experts were unprepared due to the Court's delay in approving funding for the experts' work. Appellant's assertions are belied by the record.

Appellant was arrested and incarcerated at the Erie County Prison on February 22, 2012. Defense counsel John J. Mead, Esq. and Nicole D. Sloane were appointed to represent Appellant.² The case was scheduled for the September of 2012 trial term. The case was not tried until the July of 2013 trial term, as the direct result of multiple defense requests for continuances.

The requests for continuances included a Motion to Continue Trial filed September 4, 2012. On September 4, 2012, the Court granted the Motion and continued the matter from the September of 2012 trial term until the February of 2013 trial term. Another Motion to Continue Trial was filed January 11, 2013. On January 11, 2013, the Court granted the Motion and continued the matter until the July of 2013 trial term. On February 13, 2013, the Court issued a scheduling Order, directing that jury selection was to commence July 8, 2013. Another Motion to Continue Trial was filed on May 29, 2013. Appellant's counsel gave no indication when the defense would be ready for trial. On June 12, 2013, the Court denied the request for

² On March 2, 2012, John J. Mead, Esq., was appointed to represent Appellant pursuant to Mead's contract with the Court. On June 1, 2012, Nicole D. Sloane of the Erie County Public Defender's Office was appointed to represent Appellant; Mead's representation of Appellant was directed to continue as "second chair." Sloane and Mead remained Appellant's counsel through the filing of the instant appeal.

continuance. A Renewed Motion to Continue Trial was filed June 27, 2013. The Renewed Motion like-wise gave no indication when the defense would be ready to proceed. The Commonwealth objected to the Motion to Continue due to the open-ended nature of the request, Commonwealth witnesses had been subpoenaed and the unknown availability of Commonwealth witnesses at a future, uncertain date. The Court denied the Renewed Motion to Continue on June 28, 2013.

The Court promptly disposed of Appellant's multiple requests for funding for experts and evaluations. The Court granted requests for funding and directed additional funds would be provided subject to further request and review.

Appellant made the following requests for funding. On March 28, 2012, the Court authorized Appellant to hire a private investigator, with costs not to exceed \$1,000.00 absent further Order. An Application for the Appointment of a Mitigation Specialist was filed June 25, 2012. The Court granted the request on July 6, 2012, authorizing a limit of \$6,500.00 unless modified by further Order. On July 9, 2012, Appellant filed a Motion for Payment of Private Investigator. On July 11, 2012, the Court authorized payment of outstanding fees and authorized additional funds for the investigator not to exceed \$1,000.00 absent further Order. On December 13, 2012, Appellant filed another Motion for Payment of Private Investigator. The same day, the Court authorized payment of outstanding expenses for the investigator, and authorized additional funding not to exceed \$1,000.00 subject to further Order. On January 17, 2013, Appellant filed an Application for Funds for Forensic/DNA Expert. On January 17, 2013, the Court authorized funding for a Forensic/DNA expert, SciLaw Forensics, Ltc, up to \$1,500.00 subject to further Order.

On January 25, 2013, Appellant filed an Application for Funds for a Forensic Pathologist. The application was granted on February 13, 2013. A Motion for Costs of Investigation was filed February 11, 2013, requesting the Court direct *the Commonwealth* to remit payment of \$600.00 investigation expense for failure to timely provide discovery materials. The motion was denied on February 13, 2013. On March 18, 2013, Appellant filed a Motion for Payment of Forensic Expert and Request for Additional Funding. On April 22, 2013, the Court entered an Order authorizing payment of outstanding charges of SciLaw Forensics, Ltc, and authorized additional funding not to exceed \$700.00 absent further Order.

On April 10, 2013, Appellant filed an Application for Funds for Psychological Testing. On April 19, 2013, the Court authorized payment of \$500.00 payable to psychologist Rebecca Billings, Ph.D., and requested more specific information as to what services would be provided in order to grant additional funds. On May 15, 2013, Appellant filed an Application for Funds for Forensic Analyst, seeking approval of initial funding of \$500.00 for the analyst. On May 15, 2013, the Court granted the request. On June 12, 2013, Appellant presented a Motion for Funds for Psychological Testing by Rebecca Billings, Ph.D. The Motion included information the Court requested in the Order of April 19th. On June 12, 2013, the Court authorized funding in the requested amount of \$4,200.00. On June 12, 2013, Appellant presented a Motion for Payment of Forensic Expert and Additional Funding. On June 12, 2013, the Court authorized funding for the forensic expert up to \$3,000.00 absent further Order. Following conclusion of the trial, Appellant submitted requests for payment of additional charges for the investigator and mitigation specialist. The Court promptly granted the requests.

The court may, in the interests of justice, grant a continuance, on its own motion or on the motion of either party. *Pa.R.Crim.P. No. 106(A)*. “The grant or denial of a motion for a

continuance is within the sound discretion of the trial court and will be reversed only upon a showing of an abuse of discretion.” *Commonwealth v. Boxley*, 948 A.2d 742, 746 (Pa. 2008). An abuse of discretion is “not merely an error of judgment; rather discretion is abused when the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will, as shown by the evidence or the record.” *Id.* See also, *Commonwealth v. Britt*, 83 A.2d 198, 204 (Pa.Super. 2013).

Appellant was arrested and incarcerated at the Erie County Prison on February 22, 2012. Bail was denied. Defense counsel was appointed on March 2, 2012. The case was originally scheduled for trial during the September of 2012 trial term. The case was ultimately continued until the July of 2013 trial term, as the result of multiple defense requests for continuances. Only two requests for continuances were denied: the Motion to Continue Trial filed May 29, 2013 and the Renewed Motion to Continue Trial filed June 27, 2013. The trial commenced July 8, 2013 and concluded July 17, 2013. Appellant was incarcerated for over one year and four months prior to the start of trial. The defense attorneys assigned to the case remained the same throughout, and had ample opportunities, time and funding to procure necessary experts and reports. The Court granted multiple defense requests for continuances and promptly disposed of requests for funding. Ultimately, all requests for funding by the Court were granted. No abuse of discretion occurred. The law was not overridden or misapplied. The Court’s judgment was not manifestly unreasonable. Appellant cannot demonstrate partiality, prejudice, bias or ill-will.

Further, Appellant cannot demonstrate he was prejudiced by denial of requests for continuances in May and June of 2013, as one of the reasons for the requests was to procure one or more experts for a possible death penalty phase of the trial. Appellant was convicted of third degree murder. The death penalty was thus not part of the sentencing scheme.

Multiple requests for continuances were granted and no abuse of discretion occurred in the denial of subsequent requests for continuances. As of this writing, no exculpatory reports have been presented to this Court to contradict the evidence adduced at trial by prosecution experts.

III. EVIDENTIARY CLAIM: VIDEO OF APPELLANT'S STATEMENT TO POLICE

Appellant objected to the playing of the videotaped interview of Appellant at the police station after his arrest. Appellant claims it was error to permit the jury to view the videotape because Appellant was handcuffed and wearing leg chains during the interview. Appellant's claims are belied by the record.

Appellant was interviewed at the police station on February 22, 2012, following his arrest that day. *T.T. 4, p. 89*. A video recording of the interview was made. Portions of Appellant's statement during the interview were redacted, to conform with the Court's rulings concerning objections raised in chambers. *T.T. 4, pp. 3-24*.

Approximately twenty minutes of the redacted interview were played for the jury.³ *T.T. 4, pp. 91-93*. The brief portion of the interview when Appellant's leg chains were barely discernable occurred when Appellant raised his feet to the table during the last eight minutes of the video. *Commonwealth Ex. No. 63*. Very clearly, the last eight minutes of the interview were not played for the jury. *T.T. 4, p. 92*. Further, any glimpse of the leg chains the jury may have seen was inconsequential. *See Commonwealth v. Carson*, 913 A.2d 220, 257 (Pa. 2006).

The jury was aware Appellant was interviewed the morning of his arrest. *T.T. 4, pp. 89-91*. Appellant was in handcuffs for security measures. The Court evaluated the matter and

³ Commonwealth Ex. No. 62 is the original videotaped interview of Appellant. Commonwealth Ex. No. 63 is the redacted copy of the interview. *T.T. 4, p. 93*. The trial transcript incorrectly indicates the original interview, Commonwealth Ex. No. 62, was played for the jury. *See T.T. 4, pp. 91-92*.

determined that, under the circumstances it would not be unusual for a person under arrest to be placed in handcuffs. *T.T. 5, pp. 19-20*. “[A] jury’s brief viewing of a defendant in handcuffs is not so prejudicial as to destroy a jury’s objectivity in rendering a verdict.” *Commonwealth v. Carson, supra*. “[A] brief viewing of the defendant in handcuffs ‘is not so inherently prejudicial as to strip the defendant of the presumption of innocence.’” *Id.*, citing *Commonwealth v. Lark*, 543 A.2d 491, 501 (Pa. 1988).

Appellant was not prejudiced and deprived of his right to a fair trial when a portion of the redacted video recording was played for the jury. No abuse of discretion occurred.

IV. EVIDENTIARY CLAIM: APPELLANT’S STATEMENTS TO SHEKIRAH CURRY

Appellant claims an abuse of discretion occurred in permitting Appellant’s girlfriend, Shekiran Curry, to testify to Appellant’s statements his teardrop tattoos represented he had killed someone and it was time to get another tattoo. Further, Curry testified Appellant threatened, “I’ll kill you like that retarded b---- Nikkia.” Appellant claims the statements about the tattoos and the threatening statement were inadmissible, irrelevant hearsay. Appellant also claims the statements about the tattoos were made too remote in time.

These hearsay statements were made by a party opponent. Pursuant to Pa.R.E. 803(25), a statement made by a party offered against that party is not excluded by the rule against hearsay.

The Court may exclude relevant evidence if its probative value is outweighed by a danger of unfair prejudice. Pa.R.E. No. 403.

Evidence is not unfairly prejudicial simply because it is harmful to the defendant’s case. The trial court is not required to sanitize the trial to eliminate all unpleasant facts from the jury’s consideration where those facts are relevant to the issues at hand. Exclusion of evidence on the grounds that it is prejudicial is limited to evidence so prejudicial that it would inflame the jury to make a decision based on something other than the legal propositions relevant to the case.

Commonwealth v. Flamer, 53 A.3d 82, 88, n. 7 (internal quotations and citations omitted).

Appellant was able to thoroughly cross-examine Curry. *T.T. 3, pp. 147-166*. Appellant did not elicit on cross-examination when the statements were made regarding the significance of the tattoos. *T.T. 3, pp. 147-166*.

Appellant's threatening statement and statements about his tattoos are statements of a party opponent and were admissible pursuant to PA.R.E. 803(25).

While harmful to Appellant's case, these statements were such that their probative value outweighed any prejudice to Appellant. Appellant's counsel was afforded full opportunity to cross-examine the witness about the statements. No abuse of discretion occurred in admitting these statements.

V. CLAIM OF DENIAL OF DUE PROCESS DURING *VOIR DIRE*

The Statement of Matters Complained of on Appeal is opaque. Paraphrased, it appears Appellant claims the Court improperly truncated defense counsel's inquiries whether prospective jurors could follow the Court's instructions during *voir dire*. Secondly, it appears Appellant claims the Court demonstrated bias during *voir dire*.

Appellant's generic claims are waived for vagueness. Pursuant to Pa.R.A.P. 1925(b)(4)(ii), the 1925(b) Statement "shall concisely identify each ruling or error that the appellant intends to challenge *with sufficient detail to identify all pertinent issues for the judge.*" *Pa.R.A.P. 1925(b)(4)(ii)*(emphasis added). "When the trial court has to guess what issues an appellant is appealing, that is not enough for a meaningful review. When an appellant fails adequately to identify in a concise manner the issues sought to be pursued on appeal, the trial court is impeded in its preparation of a legal analysis which is pertinent to those issues.

Commonwealth v. Lemon, 804 A.2d 34, 37 (Pa.Super. 2002)(internal quotation marks and citations omitted); *see also*, *Commonwealth v. Dowling*, 778 A.2d 683, 686-687 (Pa.Super. 2001). Appellant fails to identify instances where the Court's alleged interference during *voir dire* occurred, or when bias was demonstrated. Since Appellant's generic claim's are not specific enough to identify and address the specific issues he wishes to raise on appeal, the Court is unable to respond and Appellant's claim's are waived. *Pa.R.A.P. 1925(b)(4)(ii), (vii)*.

Assuming *arguendo* Appellant's claims are not waived, they are negated by defense counsels' express statements of satisfaction with the jurors selected. *See Transcripts of Proceedings, Voir Dire, July 8, 2013, July 9, 2013 and July 10, 2013*.

The scope of *voir dire* rests in the sound discretion of the trial judge, whose decision will not be reversed unless palpable error is established. *Commonwealth v. Mattison*, 82 A.3d 386, 397 (Pa. 2013); *Commonwealth v. Robinson*, 864 A.2d 460, 488 (Pa. 2004). No palpable error occurred during *voir dire*. The claims are meritless.

VI. EVIDENTIARY CLAIM: PHOTOGRAPHS OF VICTIM

Appellant claims the Court abused its discretion in permitting the prosecution to publish to the jury photographs of the victim depicting her blindfolded and bound, with multiple stab wounds and a considerable amount of blood. Appellant claims the photographs were inflammatory, had no overwhelming evidentiary value and were cumulative of other evidence.

Photographs of a crime victim are not *per se* inadmissible. *Commonwealth v. Robinson*, 864 A.2d 460, 501 (Pa. 2004). "The admissibility of photos of the corpse in a homicide case is a matter within the sound discretion of the trial court, and only an abuse of discretion will

constitute reversible error.” *Id.* at 502, citing *Commonwealth v. Rush*, 646 A.2d 557, 560 (Pa. 1994).

The test for determining whether photographs are admissible involves a two-step analysis. First, the court must decide whether a photograph is inflammatory by its very nature. If the photograph is deemed inflammatory, the court must determine whether the essential evidentiary value of the photograph outweighs the likelihood that the photograph will improperly inflame the minds and passions of the jury.

Commonwealth v. Malloy, 856 A.2d 767, 776 (Pa. 2004)(internal quotations and citations omitted).

As our Courts have explained,

A criminal homicide trial is, by its very nature, unpleasant, and the photographic images of the injuries inflicted are merely consonant with the brutality of the subject of inquiry. To permit the disturbing nature of the images of the victim to rule the question of admissibility would result in exclusion of all photographs of the homicide victim, and would defeat one of the essential functions of a criminal trial, inquiry into the intent of the actor. There is no need to so overextend an attempt to sanitize the evidence of the condition of the body as to deprive the Commonwealth of opportunities of proof in support of the onerous burden of proof beyond a reasonable doubt. Further, the condition of the victim's body provides evidence of the assailant's intent, and, even where the body's condition can be described through testimony from a medical examiner, such testimony does not obviate the admissibility of photographs.

Commonwealth v. Rush, *supra* at 560, citing *Commonwealth v. McCutchen*, 454 A.2d 547, 549-550 (Pa. 1982).

Appellant failed to identify in the 1925(b) Statement the specific photographs of the victim which are at issue. However, photographs of the bedroom where the victim was found and the doorway leading into the bedroom were admitted during the first day of trial as Commonwealth Ex. Nos. 9-18. *T.T. 1*, pp. 95-100. The photographs of the bedroom include photographs of the victim. *Id.* Outside the presence of the jury, defense counsel objected to the “last three pictures” of the victim in the bedroom. *T.T. 1*, pp. 3, 100. With regard to the last

three photos⁴, one photo depicts the victim partially covered with a cloth around her head and wounds to the chest; two photos depict the victim and blood spatter on the wall. *T.T. 1*, pp. 99-100. The Court gave cautionary instructions to the jury regarding the photos during the trial and at the close of the evidence. *T.T. 1*, pp. 39-40; *Trial Transcript, Day 5, July 16, 2013 ("T.T.5")*, pp. 88-89.

While potentially inflammatory, the three photographs were not overly gruesome. Their evidentiary value outweighed the likelihood the photos would improperly inflame the passions and minds of the jury. The jurors were aware this was a homicide trial and the victim had been brutally stabbed. The photographs assisted in demonstrating the positioning and appearance of the body as the victim's parents discovered it, the crime scene as testified to by investigating officers, the violent nature of the assault, and the wounds described by the pathologist. The Court gave cautionary instructions to the jury during trial and at the close of the record. There was no abuse of discretion as the probative value of the photographs outweighed the prejudicial value.

VII. APPELLANT'S SENTENCE FOR MURDER OF THE THIRD DEGREE

Appellant claims the sentence for Third Degree Murder was manifestly excessive and clearly unreasonable. Appellant claims the Court failed to consider Appellant's rehabilitative needs and prior criminal history. Appellant claims the Court relied on impermissible factors when sentence was imposed. Appellant claims the Court impermissibly considered the allegations supporting a First Degree Murder charge when sentence was imposed.

⁴ The last three photographs of this series are Commonwealth Ex. Nos. 16, 17, and 18.

A. Claim that Sentence is Manifestly Excessive and Clearly Unreasonable

B. Claim that Court Failed to Consider Rehabilitative Needs and Prior Criminal History

Appellant claims the sentence for Third Degree Murder was manifestly excessive and clearly unreasonable. Initially, Appellant's claim is not specific enough to adequately address. Pursuant to Pa.R.A.P. 1925(b)(4)(ii), the 1925(b) Statement "shall concisely identify each ruling or error that the appellant intends to challenge *with sufficient detail to identify all pertinent issues for the judge.*" Pa.R.A.P. 1925(b)(4)(ii)(emphasis added). "When the trial court has to guess what issues an appellant is appealing, that is not enough for a meaningful review. When an appellant fails adequately to identify in a concise manner the issues sought to be pursued on appeal, the trial court is impeded in its preparation of a legal analysis which is pertinent to those issues. In other words, a Concise Statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no Concise Statement at all." *Commonwealth v. Lemon*, 804 A.2d 34, 37 (Pa.Super. 2002)(internal quotation marks and citations omitted); *see also*, *Commonwealth v. Dowling*, 778 A.2d 683, 686-687 (Pa.Super. 2001). It is important to note "bald assertions or the invocation of special words in a concise statement of reasons" are inadequate to establish the existence of a substantial question. *Commonwealth v. Kalichak*, 943 A.2d 285, 289-90 (Pa.Super. 2008)(citing *Commonwealth v. Malovich*, 903 A.2d 1247, 1252 (Pa.Super. 2006)). Since Appellant's claim is not specific enough to identify and address the issue he wishes to raise on appeal, Appellant's claim is waived. Pa.R.A.P. 1925(b)(4)(ii), (vii).

Assuming *arguendo* the claim is not waived, it is a non-reviewable challenge to the discretionary aspects of the sentence.

In *Commonwealth v. Watson*, 835 A.2d 786 (Pa.Super. 2003), the defendant's claim that his sentence was unreasonable, manifestly excessive and an abuse of discretion was held to be a challenge to the discretionary aspects of his sentence.

The Superior Court has stated:

A challenge to the discretionary aspects of a sentence must be considered a petition for permission to appeal, as the right to pursue such a claim is not absolute. Two requirements must be met before we will review this challenge on its merits. First, an appellant must set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence. Second, the appellant must show that there is a *substantial question that the sentence imposed is not appropriate under the Sentencing Code*. The determination of whether a particular issue raises a substantial question is to be evaluated on a case-by-case basis. In order to establish a substantial question, the appellant must show actions by the trial court inconsistent with the Sentencing Code or contrary to the fundamental norms underlying the sentencing process.

Commonwealth v. McAfee, 849 A.2d 270, 274-275 (Pa.Super. 2004)(internal citations omitted, emphasis added).

Appellant's bald assertion his sentence is excessive and clearly unreasonable does not raise a "substantial question" preserving appellate review of the discretionary aspects of his sentence. Appellant has not sufficiently articulated how his sentence violates either a specific provision of the Sentencing Code, or a particular fundamental norm underlying the sentencing process. See, *Commonwealth v. Mouzon*, 812 A.2d 617 (Pa. 2002). Therefore, this claim must be dismissed.

Further, Appellant's sentence does not violate a specific provision of the Sentencing Code or a fundamental norm underlying the sentencing process. The law on sentencing discretion is well-settled:

Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. To constitute an abuse of discretion, the sentence imposed must either exceed the statutory limits or be manifestly excessive. In this context, an abuse of discretion

is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

Commonwealth v. Mouzon, 828 A.2d 1126, 1128 (Pa.Super. 2003)(citations and quotation marks omitted).

In determining whether a sentence is manifestly excessive, the appellate court must give great weight to the sentencing court's discretion, as he or she is in the best position to measure factors such as the nature of the crime, the defendant's character and the display of remorse, defiance, or indifference.

Commonwealth v. Ellis, 700 A.2d 948, 958 (Pa.Super. 1997).

A sentencing court is required to place on the record its reasons for imposition of sentence. 42 Pa.C.S.A. §9721(b). The sentencing judge can satisfy this requirement by identifying on the record that he was informed by a presentence report. *Commonwealth v. Devers*, 546 A.2d 12, 18 (Pa. 1988); *Commonwealth v. Pennington*, 751 A.2d 212, 217 (Pa.Super. 2000). Where the sentencing court has the benefit of a pre-sentence report, the law presumes that the court "was aware of the relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors" delineated in the Sentencing Code. *Commonwealth v. Cruz-Centeno*, 668 A.2d 536, 545-546 (Pa.Super. 1995), quoting *Commonwealth v. Devers*, 546 A.2d 12, 18 (Pa. 1988); *Commonwealth v. Sanders*, 627 A.2d 183, 188 (Pa.Super. 1993). "Having been fully informed by the pre-sentence report, the sentencing court's discretion should not be disturbed." *Cruz-Centeno, supra*, quoting *Devers, supra*; *Sanders, supra*.

In the case at bar, Appellant's sentence for Third Degree Murder was within the statutory maximum. Appellant's sentence at Count 1, Murder of the Third Degree, was 20 to 40 years of incarceration. The statutory maximum for Third Degree Murder is 40 years. 18 Pa.C.S.A.

§1102(d). The minimum sentence of 240 months is within the standard guideline range. *Commonwealth v. Ventura*, 975 A.2d 1128, 1134 (Pa.Super. 2009). The sentence is, therefore, within the Sentencing Guidelines. *Id.*

Appellant's claim the Court did not consider Appellant's rehabilitative needs or his Prior Record Score of one (1) is belied by the record. At sentencing, the Court carefully considered the Presentence Investigative Report and Sentencing Guidelines. *Transcript of Sentencing (Tr. Sentencing)*, September 10, 2013, p. 20. The Sentencing Guidelines factor in the Prior Record Score of one (1) and the Offense Gravity Score. See *Commonwealth v. Ellis*, *supra* at 968. The Court considered Appellant's background as set forth in the Presentence Investigative Report, the brutality of the crime and its impact on the community. The Court also considered the statement of Appellant and the memorandum from Appellant's counsel, entitled "Pre-Sentence Statement From Defense Attorney". See *Tr. Sentencing*. The record is devoid of any indication the Court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision. The claim is meritless.

C. Claim that Court Relied Upon Impermissible Factors

Appellant baldly claims the Court fashioned the sentence for Third Degree Murder by considering impermissible factors and impermissibly considered allegations supporting a First Degree Murder charge. Appellant's claims challenge the validity of the sentence. See *Commonwealth v. Chase*, 530 A.2d 458, 460 (Pa.Super. 1987). It is sufficient to render a sentence invalid if it reasonably appears from the record that the trial court relied in whole or in

part upon an erroneous consideration. *Commonwealth v. Scott*, 860 A.2d 1029, 1030 (Pa.Super. 2004); *Commonwealth v. Schwartz*, 418 A.2d 637, 638 (Pa.Super. 1980).

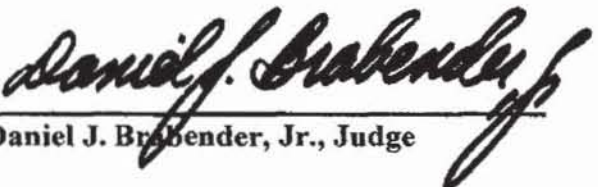
However, Appellant's claim, as stated, once again does not comport with the requirements of Pa.R.A.P. 1925(b). Appellant fails to specifically identify which impermissible factors were considered. Appellant does not identify specific statements in the record attributed to the Court regarding First Degree Homicide. Without knowing what statements Appellant refers to, and the location in the record where they may be found, the Court is unable to respond to the vague and unsupported claims that impermissible factors were considered. Therefore, Appellant's bald claims the Court considered impermissible factors in sentencing Appellant for Third Degree Murder are waived. *Pa.R.A.P. 1925(b)(4)(ii), (vii)*.

CONCLUSION

For the reasons stated herein, this appeal must be dismissed as wholly lacking in merit.

BY THE COURT:

3/31/2014
Date


Daniel J. Brabender, Jr., Judge

cc: Roger M. Bauer, Esq., District Attorney's Office
Tina M. Fryling, Esq., Public Defender's Office